

EXHIBIT D

Subject: Re: MDL 2804 - Agenda Item 334 (Plaintiffs' Motion to Compel Kroger)
Date: 10/13/2022 11:52 AM
From: "david@specialmaster.law" <david@specialmaster.law>
To: "Anthony Irpino" <airpino@irpinolaw.com>, "William Lorensen" <wlorensen@bowlesrice.com>, "Josh Gay" <jgay@levinlaw.com>
"Ronda Harvey" <rharvey@bowlesrice.com>, "Ashley Hardesty Odell" <ahardestyodell@bowlesrice.com>, "Gabriele Wohl" <gwohl@bowlesrice.com>, "ldunning@levinlaw.com" <ldunning@levinlaw.com>, "Jeff Gaddy" <jgaddy@levinlaw.com>, "Pearl Robertson" <probertson@irpinolaw.com>, "Pete Weinberger" <PWeinberger@spanglaw.com>, "JYoung@ForThePeople.com" <JYoung@ForThePeople.com>, "Anthony Majestro" <amajestro@powellmajestro.com>, "2804 Discovery, MDL" <mdl2804discovery@motleyrice.com>, "Tracks6to10Defendants@bbhps.com" <tracks6to10defendants@bbhps.com>
Cc:

Greetings. Please find below my ruling on Agenda Item 334.

As an initial matter, I need Kroger and Ps each to confirm via responsive email to me that Kroger has produced to the MDL Repository all of the documents it produced in New Mexico, in the same form as produced in New Mexico. I believe this has occurred, but that conclusion is based partly on inference and I need it made 100% clear.

Second, I conclude Plaintiffs' request for additional custodial searching and 30(b)(6) discovery is well-taken.

Kroger had a duty to prepare their 30(b)(6) witnesses relative to SOMS, which was well within the scope of the 30(b)(6) notice served on March 3, 2022; and Plaintiffs were deprived of an opportunity to question that witness about highly relevant documents. Accordingly, Kroger is ordered to: (1) search for and produce from the custodial files of Frances Tucker any and all documents related in any way to the Buzzeo audits and PCC Minutes ; (2) meet and confer with the PEC to identify no more than two additional appropriate Kroger custodians, regarding whom Kroger will engage in the same search and production; and (3) make available a corporate representative to testify about these documents for 2.0 hours.*

I deny Plaintiffs' request for fee-shifting in connection with the above directive. I urge Kroger not to put me into position of having to decide a second time whether fee-shifting is an appropriate sanction.

-David

* The additional deposition time may be used only for questioning about the documents at issue and the specific topics those documents address; questioning counsel may not pursue information about other topics unrelated to the documents, even including other topics listed in the 30(b)(6) notice that are not addressed in the documents. Please also note: that counsel is allowed 2.0 hours does not mean counsel should use it all, if not necessary.

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This email sent from:
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From: Anthony Irpino <airpino@irpinolaw.com>
Sent: Tuesday, October 4, 2022 11:12 AM
To: William Lorenzen <wlorenzen@bowlesrice.com>; David R. Cohen (David@SpecialMaster.Law) <david@specialmaster.law>; Josh Gay <jgay@levinlaw.com>
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Subject: RE: MDL 2804 - Agenda Item 334 (Plaintiffs' Motion to Compel Kroger)

Will, the letter you attached to your email of this morning was not sent to Plaintiff counsel on Friday. I did not receive it and I have now heard from several Plaintiff counsel on the MDL2804 listserv and nobody received it. We will review Kroger's new production once our vendor is able to load it and we will contact Kroger directly if there are any issues. While it is unfortunate that it took so much effort and motion practice to have Kroger follow DR-22, we are glad that one of the issues is now apparently resolved.

SM Cohen, Plaintiffs still need and request a ruling compelling Kroger to search the custodial files of Frances Tucker and other Kroger personnel not subject to Kroger's 30-day purge policy and compelling a limited 30(b)(6) deposition (over the improperly withheld documents) as laid out in our 9/23 motion.

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From: William Lorenzen <wlorenzen@bowlesrice.com>
Sent: Tuesday, October 4, 2022 7:51 AM
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Anthony,

Contrary to your submission, Kroger produced the disputed materials in full to the DR-22 last

week. Please see the attached production letter which was uploaded to the FTP last week. Our vendor just advised us that the password in the letter we served last week is incorrect; please see the corrected password.

Password in Cover letter: s3iyo6lt&L&
Correct password: wavigAfAwrupREc0

William Lorenzen

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From: Anthony Irpino <airpino@irpinolaw.com>
Sent: Monday, October 3, 2022 7:49 PM
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Subject: RE: MDL 2804 - Agenda Item 334 (Plaintiffs' Motion to Compel Kroger)

Special Master Cohen & Josh:

Attached please find Plaintiffs' reply letter brief and exhibits 1 – 5 in support of Plaintiffs' motion against Kroger (Agenda Item #334). Please advise if there are any issues with the attachments or if anything further is required from Plaintiffs relative to this agenda item. Thank you.

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From: david@specialmaster.law <david@specialmaster.law>
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Thank you. Plaintiffs' proposed dates for response and reply are well-taken.

Kroger's response should please also address with specificity the question of what sanctions should or should not be levied if I agree with Plaintiffs that they are appropriate. See docket no. 3700 at 8-12. Please note that Kroger's status as a T7 "New Defendant" does not relieve it from adherence to all of the MDL Court's prior orders.

-David

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Sent: Friday, September 23, 2022 6:20 PM

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Subject: MDL 2804 - Agenda Item 334 (Plaintiffs' Motion to Compel Kroger)

Special Master Cohen & Josh:

Attached please find Plaintiffs' letter brief and exhibits A – G as our submission for Agenda Item #334. Plaintiffs request that Kroger provide any response by 9/30, and that any reply from Plaintiffs be due by 10/3. Please advise if there are any issues with the attachments or if anything further is required from Plaintiffs relative to this agenda item. Thank you.

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